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No. 95-———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. SCARTH, *et al.*,
Petitioners,

v.

NICOR EXPLORATION COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1980 the Federal Energy Regulatory Commission ("FERC" or "Commission") filled a legislative gap created by the Natural Gas Policy Act of 1978 ("NGPA") and established rules for interpreting whether gas contract price escalation provisions allow price levels permitted by that statute. In the case below, the Fifth Circuit held that it need not grant deference to FERC's rules or their application, but could consider the contract interpretation issue "*de novo.*" The Fifth Circuit's decision is in direct conflict with other circuit Courts of Appeal that, in accord with *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), give deference to agency contract interpretation. The Fifth Circuit's decision raises the following significant questions:

1. Whether a court, in reviewing agency rules for interpreting contractual language that is subject to and developed to comply with the agency's regulations under its enabling statutes, owes deference to such agency's rules and interpretation?

2. Whether a reviewing court is bound by and must defer to an agency's inferences of fact and regulatory presumptions if they are supported by substantial evidence?

3. Whether the Fifth Circuit's judgment was clearly erroneous in its application of Oklahoma law because it directly conflicts with and plainly fails to follow the requirements of Oklahoma law?

4. Whether, after reversing an agency based upon errors of law, a reviewing court can, on remand, direct the agency's exercise of its discretion under its enabling statutes?

LIST OF PARTIES

The following are the Petitioners in this case, and are referred to in this Petition as "Robert W. Scarth, *et al.*" or "Scarth":

Robert W. Scarth (successor to Scarth Oil & Gas Company) and on behalf of the following other working interest owners in the Green Well:

Mitchell Energy Corporation
A.L. Park
David Dean
Leon M. Grandcolas and Rita M. Grandcolas Trustees of the Grandcolas Family 1991 Revocable Trust
Doug Hershey
Robert Lee, Jr.
Dorsey Schad
Charles Sweeney
Kay Fancher
Jerry Haggard
Stephen Johnes
Bill Logsdon
Ed Naslund
Virgil Scarth
Jane Schuebell.

The following were parties to the proceedings before the court whose judgment is sought to be reviewed:

Robert W. Scarth, *et al.*;
NICOR Exploration Company; and
Federal Energy Regulatory Commission.

The parent company of Mitchell Energy Corporation is MND Energy Corporation. The parent company of MND Energy Corporation is Mitchell Energy & Development Corp. Mitchell Energy Corporation has no non-wholly owned subsidiaries.

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* This regulation was removed from FERC's regulations. *Removal of Outdated Regulations Pertaining to the Sales of Natural Gas Production*, Order No. 567, III F.E.R.C. Stats. & Regs. (CCH) ¶ 30,999 (1994).

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Robert W. Scarth, *et al.* ("Scarth"), respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's opinion is reported at 50 F.3d 1341 (5th Cir. 1995). App. 1a-14a. Scarth's Petitions for Rehearing and Rehearing *En Banc* of that Opinion were denied on July 5, 1995, and is unreported. App. 100a. The Fifth Circuit reversed orders issued in *NICOR Exploration Co.* by the Commission, reported at 63 FERC ¶ 61,034 (1993) and 66 FERC ¶ 61,276 (1994), App. 54a-75a and 76a-99a, respectively. The foregoing orders are rehearing orders related to an Initial Decision issued by an Administrative Law Judge ("ALJ"), 56 FERC ¶ 63,023 (1991), and an initial FERC order affirming the Initial Decision, 58 FERC ¶ 61,203 (1992), App. 15a-31a and 32a-53a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 27, 1995. Scarth's timely Petition for Rehearing and Petition for Rehearing *En Banc* were denied on July 5, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), § 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(b), and § 506(a)(4) of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3416(a)(4).

STATUTES AND REGULATIONS

This case involves the following statutes and regulations which are set out *verbatim* in the Appendix: Natural Gas Act, §§ 4(a), (c) and (e), 5(a), 19(b), 15 U.S.C. §§ 717c(a), (c) and (e), 717d(a) and 717r(b); Natural Gas Policy Act, §§ 2(11)-(14), 101(b)(5) and (9), 104, 108, 506(a)(4) and 601(b)(1)(A), 15

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STATEMENT OF THE CASE

The case arises as a result of FERC's implementation of the NGA and NGPA. The jurisdiction of the Fifth Circuit was invoked by the judicial review provisions of the NGA, 15 U.S.C. § 717r(b), and the NGPA, 15 U.S.C. § 3416(a)(4).

Under the NGA, FERC in the 1960's and 1970's determined the ceiling price that natural gas producers, such as Scarth, could charge buyers, such as NICOR, by first establishing such prices by geographical area, and then establishing such prices on a nationwide basis. *See Public Serv. Comm'n of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 330 (1983). The Commission in 1974 "shift[ed] from a pure historical-cost-based [approach to producer rates] to an incentive-price-based approach." *Id.* Throughout the 1970's NICOR paid the Commission-established incentive prices that were set under the NGA (Exh. 43 at 2). Congress in 1978 passed the NGPA which generally supplanted FERC's NGA ratemaking authority with a series of congressionally-established "maximum lawful prices." Congress delegated to FERC the authority to implement the NGPA, including the duty to establish rules for determining whether "area rate clauses" ("ARCs"), that had been included in producer contracts pursuant to Commission regulations under the NGA, provided contractual authority to collect the new NGPA prices.

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[1] §§ 154.93 and 270.205 were removed in 1994 from FERC's regulations. *Removal of Outdated Regulations Pertaining to the Sales of Natural Gas Production*, Order No. 567, III F.E.R.C. Stats. & Regs. (CCH) ¶ 30,999 (1994).

Scarth's predecessor producers in 1970 entered into three gas sales contracts with NICOR's predecessor as purchaser (the Sun, GHK and Amerada contracts). Such contracts included ARCs. The ARCs generally provided that the price of gas sold under the contracts may increase if the Commission "or any successor governmental authority" prescribes a higher rate for the area in which the gas is located. App. 124a, 125a and 126a. The ARCs were included in the contracts in order to comply with a Commission regulation that prohibited all indefinite price escalator clauses except for ARCs. 18 C.F.R. §§ 154.93 (b-1) and (c) (1992). The ARCs did not contain any language limiting the price to "cost based" prices.

In response to Congress' enactment of the NGPA, FERC modified its ARC regulations by issuing *Final Regulations Amending and Clarifying Regulations Under the Natural Gas Policy Act and the Natural Gas Act*, Order No. 23, 1977-1981 F.E.R.C. Stats. & Regs., Regs. Preambles (CCH) ¶ 30,040 (1979), [hereinafter Order 23] *aff'd, Pennzoil Co. v. FERC*, 645 F.2d 360, 367 5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) [hereinafter *Pennzoil I*]. FERC noted that issues pertaining to the use of ARCs to collect NGPA prices "are directly related and are of consequence to the Commission's administrative and enforcement responsibilities" under the NGA and NGPA. Order 23 at 30,301. *Pennzoil I* affirmed FERC's determination in Order 23 to use general contract law to determine whether ARCs permit escalation to NGPA prices, but required FERC to follow any differences that appropriate state contract law may have, and placed the burden "on the parties to inform FERC if the state law that should apply is any different from the general principles that FERC utilizes." 645 F.2d at 383-84, 387.

FERC in 1980 issued Opinion 77 as a further refinement of Order 23. *Independent Oil & Gas Ass'n of W. Va.*, 10 F.E.R.C. (CCH) ¶ 61,214 (1980) [hereinafter Opinion 77]. Opinion 77 set forth the specific contract

interpretation rules FERC would employ in determining whether an ARC permits escalation to NGPA prices.

In 1990 NICOR "protested" before FERC Scarth's attempt to collect the NGPA § 108 ceiling price under the ARCs in its contracts. The protest was heard by an ALJ who found that there was no reliable and probative extrinsic evidence of contractual mutual intent. He thus applied FERC's Opinion 77 contract interpretation rules, and held that the ARCs did not contractually authorize collection of § 108 prices. App. 20a-22a. FERC first agreed with the ALJ's ultimate conclusion of lack of contractual authorization. App. 32a-53a. Upon rehearing, FERC determined that it and the ALJ misapplied Opinion 77, and that, properly applied, such rules show that Scarth met its burden of proving contractual authorization. App. 54a-75a, *reh'g denied*, App. 76a-99a.

Upon review, the Fifth Circuit reversed, holding that (1) FERC's construction of the ARCs was not entitled to deference but should be reviewed *de novo*, which action invalidated FERC's 15-year old Opinion 77 criteria; (2) FERC failed to apply Oklahoma contract law properly although FERC found that NICOR below had argued that "the Opinion 77 interpretive standards are consistent with Oklahoma law," App. 84a; and (3) Scarth failed to satisfy his burden of proof under state law and the NGA because Opinion 77 allegedly shifted the burden of proof. The court directed FERC on remand to issue an order "denying Scarth's request for a rate increase."

REASONS FOR GRANTING THE WRIT

I. *NICOR* WAS DECIDED IN CONFLICT WITH *CHEVRON* WHICH REQUIRES DEFERENCE TO FERC'S RULES IMPLEMENTING ITS ENABLING STATUTES

The Fifth Circuit ignored the requirement in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), that compels deference to FERC's rules that implement its enabling

statutes, the NGA and NGPA.[2] The NGA delegates to FERC the responsibility to examine interstate natural gas sales contracts. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), held that the NGA protects the public interest by Commission "supervision of the individual contracts." *Id.* at 339. The "basic power of the Commission" is "to set aside and modify any . . . contract which it determines" to be unjust or unreasonable, which involves "the power to review . . . contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them." *Id.* at 341. Whether there is contractual authority to collect a particular rate "involves matters peculiarly within the area of the Commission's special competence" which "could hardly be aided by a further examination of the record by the Court of Appeals." *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958).

FERC's contract supervisory role was reemphasized with the NGPA.[3] Congress resided in FERC "both the authority and responsibility to administer the [NGPA] and, in particular, to insure the integrity of the ceiling prices established in Title I." Order 23, 1977-1981 F.E.R.C. Stats. & Regs. (CCH) at 30,304. As to gas which remained regulated by FERC under the NGA after

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[2] *Chevron* developed a two-step process to determine whether deference should be afforded agency implementation of the statutory scheme it is entrusted to administer. The reviewing court first must determine "whether Congress has directly spoken to the precise question." *Chevron*, 467 U.S. at 842. If the statute is silent or ambiguous, the court must decide whether the "agency's answer is based on a permissible construction of the statute." *Id.* at 843. It is not necessary that the agency's construction be "the only one it permissibly could have adopted . . . or even the reading the court would have reached." *Id.* at 843 n.11.

[3] The NGPA "does not constitute a federal retreat from a comprehensive gas policy" and indeed "the NGPA in some respects expanded federal control" beyond the NGA. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 421 (1986).

the NGPA (such as that involved here), the *"Mobile-Sierra* doctrine requires the Commission to determine whether contractual authorization exists for the collection of the maximum lawful prices established by the [NGPA]." *Id.* at 30,305. FERC likewise noted its "responsibility . . . to determine whether contractual authority exists for collection of NGPA rates" because "rate filings inconsistent with contractual obligations are invalid." 10 F.E.R.C. (CCH) at 61,408 n.2. Moreover, "[t]he need for interpreting" ARCs "arises . . . under Section 101(b)(9) of the NGPA." *Id.* at 61,407 n.4.

FERC's delegated statutory duty under the NGPA therefore includes (1) "[j]urisdiction to interpret interstate gas sales contracts" and apply its regulations "to those contracts;" (2) the "duty to ensure compliance with [NGPA] price ceilings for regulated gas;" and (3) the "responsibility to effectively enforce compliance with the NGPA price ceilings." *Fritz v. FERC,* 876 F.2d 1224, 1228 (5th Cir. 1989).

FERC's congressionally-established supervisory role specifically includes review of gas price escalation clauses. This Court affirmed the Commission's 1962 regulation that barred all indefinite price escalator provisions, other than ARCs, noting that FERC need not "acquiesce in the use of contracts which carry provisions incompatible with a scheme of effective rate regulation." *FPC v. Texaco, Inc.,* 377 U.S. 33, 42 n.12 (1964), *quoting* Order 242, 27 F.P.C. 339, 340 (1962). ARCs permit "a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission." 18 C.F.R. § 154.93(b-1). When the Commission replaced its area ratemaking with nationwide rates in 1974, it permitted ARCs to escalate prices to the *national* rates, despite language limiting escalations to *area* rates. *Pennzoil I,* 645 F.2d at 367, 382-83.

Following the NGPA, FERC sought to determine congressional intent respecting ARCs, but found that the NGPA's legislative history "reveals little in the way of

direct and specific guidance on this matter," and, "[i]n large measure, therefore, *the Commission is left to deduce the intent of Congress*" respecting the effect of ARCs. Order 23, 1977-1981 F.E.R.C. Stats. & Regs. (CCH), at 30,309-10 (emphasis supplied).[4] FERC issued Order 23 and Opinion 77 which established rules designed to determine whether ARCs authorize collection of any or all NGPA ceiling rates. FERC has consistently applied these longstanding rules of construction in interpreting ARCs for more than fifteen years.[5]

1. *NICOR* directly contravenes *Chevron*. *Chevron* holds that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. While Congress did not direct FERC how to supervise ARCs, FERC being "left to deduce the intent of Congress," *FERC was delegated the authority to address this supervisory issue*, and *Chevron* held that "[i]f Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency." 467 U.S. at 843-44. In 1980 FERC in Opinion 77 adopted ARC interpretation rules to supervise gas sales contracts subject to its jurisdiction, and applied its rules in this adjudication. In such a case "a court may not substitute its own construction . . . for a reasonable [agency] interpretation." *Chevron*, 467 U.S. at 844. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991), held:

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[4] Although the NGPA does cede Commerce Clause authority to the states to supervise indefinite price escalator clauses in *intrastate* contracts, FERC retained its full supervisory authority under such statute relative to such clauses, including ARCs, in *interstate* contracts. H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess. 125 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8800, 9041 [hereinafter Conference Report].

[5] *See, e.g., Colorado Interstate Gas Co.*, 44 F.E.R.C. (CCH) ¶ 61,023 (1988); *Oklahoma Natural Gas Gathering Co.*, 23 F.E.R.C. (CCH) ¶ 61,308 (1983); *Equitable Gas Co.*, 23 F.E.R.C. (CCH) ¶ 61,015 (1983).

> When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.

Congress clearly delegated policymaking authority to FERC under the NGPA by permitting FERC "to issue rules and orders under the Act, and to perform any and all acts as it may find necessary or appropriate to carry out the provisions of this Act." Conference Report at 116, *reprinted in* 1978 U.S.C.C.A.N. at 9032-33, discussing NGPA § 501, 15 U.S.C. § 3411. *See also* NGPA § 16, 15 U.S.C. § 717*o*.

2. FERC exercised its delegated authority and "special competence" under the NGA and NGPA in interpreting Scarth's 1970 ARCs that had been developed to comply with FERC's regulation that limited the permissible language. FERC's interpretation of the scope of its statutory authority, implemented through Opinion 77, and this adjudication:

> represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex,[1] the agency considered the matter in a detailed and reasoned fashion,[1] and the decision involves reconciling conflicting policies.

Chevron, 467 U.S. at 865 (citations omitted). Opinion 77 noted that ARCs "were a product of the then prevailing [NGA] regulatory scheme". 10 F.E.R.C. (CCH) at 61,396. Opinion 77 reconciled the policy question of whether ARCs would also permit collection of NGPA prices. 10 F.E.R.C. (CCH) at 61,396-97. FERC applied both its expert knowledge of this technical area and the "prevailing regulatory scheme" to the Scarth ARCs to determine that NICOR agreed to pay the highest rate permitted by law. App. 61a, n.14; 91a-92a, n.25. FERC thereby exercised its statutory authority and duty of determining the appropriate NGPA price category eligi-

bility.[6] FERC's implementation of the NGA and NGPA through Opinion 77 and this adjudication was reasonable, and the Fifth Circuit erred by failing to apply *Chevron* and accord deference to FERC.

II. THIS COURT SHOULD RESOLVE THE CLEAR CONFLICT AMONG CIRCUITS CONCERNING DEFERENCE TO AGENCY INTERPRETATIONS OF CONTRACTUAL LANGUAGE SUBJECT TO AND DEVELOPED TO COMPLY WITH AGENCY REGULATIONS

Certiorari should also be granted to resolve the square and irreconcilable conflict betwen the Fifth Circuit's *NICOR* decision and the D.C., Fourth, Seventh and Tenth Circuits on the issue of judicial deference under *Chevron* to an agency's interpretation of contracts subject to and developed to comply with agency regulations.

A. *NICOR* Directly Conflicts With Other Circuits

NICOR held that FERC's contract construction is not entitled to deference but should be reviewed *de novo* because FERC allegedly did not exercise its expertise. App. 10a. *NICOR* is incorrect. As shown in Section I, *supra*, FERC did exercise its regulatory expertise in interpreting the ARCs in Scarth's contracts, and therefore its interpretation is entitled to deference. In contrast, just recently in *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1486 (10th Cir. 1995), the Tenth Circuit applied *Chevron* and deferred to FERC's interpretation of language contained in natural gas tariffs. Such tariffs "are binding contracts," and "[t]he task of interpretation of tariffs . . . is akin to the task of statutory interpreta-

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[6] *Pennzoil Co. v. FERC*, 671 F.2d 119 (5th Cir. Unit A 1982), held that "[a]dvertence to the terms of private contracts in delineation of eligibility for price categories is not novel," and noted that FERC often made reference to contract terms in determining price eligibility under the NGA. *Id.* at 126-27. *See, e.g., Superior Oil Co. v. FERC*, 569 F.2d 971, 974-75 (5th Cir.), *cert. denied*, 439 U.S. 834 (1978).

tion . . . [both involving] mainly questions of law." *Coca-Cola Co. v. Atchinson, T. & S.F. Ry.*, 608 F.2d 213, 219 (5th Cir. 1979). Scarth's contracts with NICOR are its FERC tariffs. Tariff provisions are developed to comply with FERC regulation, just as Scarth's ARCs were developed to comply with Commission regulation.

The Tenth Circuit stated that a reviewing court "is not free to substitute its own judgment for that of the agency, but must instead uphold the agency decision if there is a rational basis for that decision." *Northwest*, 61 F.3d at 1486. The Tenth Circuit relied on FERC's experience in interpreting contract language in a tariff, *id.*, and stated that while FERC's interpretation was "not the only possible construction," it was reasonable and "entitled to . . . deference." *Id.* at 1487 (citation omitted).

The Tenth Circuit also relied upon the D.C. Circuit's similar holdings in *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544 (D.C. Cir. 1993), and *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987). *Williams* held that "FERC's interpretation" of contracts "is properly reviewed under the principles enunciated in *Chevron*," which requires a determination of whether the contract is ambiguous, but held that deference to FERC's construction of ambiguous contracts is required "so long as it is reasonable." 3 F.3d at 1551.[7]

In *National Fuel*, the D.C. Circuit held that under the principles of *Chevron*, judicial deference to *FERC's* in-

[7] *Williams* involved interpretation of a contract to determine compliance with FERC's regulations. *Williams* relied upon *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992) ("Congress explicitly delegated to FERC broad powers . . . including the power to analyze relevant contracts", *quoting Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 441-42 (D.C. Cir. 1988), which also held that "[a]lthough the interpretation . . . is a matter of contract law, we nonetheless owe deference").

terpretation of contractual language is required. 811 F.2d at 1569. The D.C. Circuit acknowledged that "the federal appellate courts have taken different positions," and that the Fifth Circuit was in conflict with it on the applicability of *Chevron*, but held that its own position was the "better view." 811 F.2d at 1568, 1570.

In *National Fuel* the D.C. Circuit further held that the delegation to an agency to administer a congressionally created program supports affording deference to agency contractual interpretations, noting that Congress "specifically delegated to the Commission a broad range of adjudicative powers over natural gas rates" and this "explicit delegation of power . . . compels a court to give deference to the agency's conclusions even on 'pure' questions of law within that domain." 811 F.2d at 1569-70, citing *Chevron*, 467 U.S. at 843-44. Consistent with statutory delegation was the further finding that the agency's interpretation:

> [T]ypically *will* be enhanced by technical knowledge. Construction of a [contract] will be influenced by the agency's expertise in the technical language of that field and by its greater knowledge of industry conditions and practices, including its more comprehensive experience with the kinds of disputes and negotiations that generally produce such an agreement.

811 F.2d at 1570. Finally, the D.C. Circuit found that *Chevron* "implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation." *Id.*

The Fourth Circuit also conflicts with *NICOR*. *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 291 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), held that FERC's interpretation of a settlement contract is entitled to deference, and that a court should not disregard the agency's expertise.

Similarly, the Seventh Circuit holds that with respect to contract interpretation issues, "[w]e owe some defer-

ence to . . . [FERC] as an expert body dealing regularly with natural gas supply contracts." *Amoco Prod. Co. v. FERC*, 765 F.2d 686, 690 (7th Cir. 1985). *See also Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984) (deference provided to FERC contract interpretation of *unambiguous* contract because "FERC employed its unique expertise in rate-setting contracts and . . . expertise in electricity transmission regulation").[8]

B. *Certiorari* Is Appropriate To Resolve The Foregoing Conflict Among Circuits

1. *Certiorari* has been granted to resolve important conflicts.[9] Granting *certiorari* to resolve the conflict among the circuits in the application of *Chevron* will provide consistency respecting the appropriate deference to be afforded agency interpretations of contracts that are subject to and were developed to comply with agency regulation.

2. The circuit conflict respecting agency contract deference is likely to recur. Such conflict was previously observed in *National Fuel*. 811 F.2d at 1570. The recent *NICOR*, *Northwest* and *Williams* decisions demonstrate the continuing nature of the conflict.

3. *Chevron* deference is appropriate here because the Fifth Circuit acknowledged that the ARCs are ambigu-

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[8] Indeed, some circuits have extended *Chevron* far beyond agency contract interpretations, to include *all* agency legal determinations. For example, the Second Circuit reviews agency *legal conclusions* only for arbitrariness, capriciousness, and abuse of discretion. *First Indep. Group, Inc. v. SEC*, 37 F.3d 30, 32 (2d Cir. 1994), *citing Higgins v. SEC*, 866 F.2d 47, 49 (2d Cir. 1989). The Seventh Circuit upholds agency determinations where its "factual findings are supported by substantial evidence and its legal conclusions have a reasonable basis in the law." *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1155 (7th Cir. 1994), citing *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1471 (7th Cir. 1992).

[9] *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985); *Lehman v. Lycoming County Children's Serv. Agency*, 458 U.S. 502, 507 (1982); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976).

ous, App. 4a, and FERC's contract interpretation was in furtherance of its statutory duties and has a reasonable result. Unlike the Fifth Circuit's decision in *NICOR*, had the principles of *Chevron* been applied by the D.C., Fourth, Seventh and Tenth Circuits, those courts would not have reviewed the matter *de novo*, but would have accorded deference to FERC's reasonable interpretation of the ARCs.

III. *NICOR* CONFLICTS WITH THIS COURT'S DECISIONS THAT REQUIRE AFFIRMANCE OF AGENCY FACTUAL INFERENCES THAT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Certiorari is appropriate because the court below "misapprehended or grossly misapplied the substantial-evidence standard." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 292 (1974). The NGA and NGPA have identical judicial review limitations providing that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. 717r (b)(NGA); 15 U.S.C. § 3416(a)(4)(NGPA). The Fifth Circuit ignored these statutory limitations and incorrectly reviewed the facts *de novo* without regard to FERC's conclusive findings.

A. There Was No Requisite Finding That FERC's Opinion 77 Factual Inferences Were Not Based On Substantial Evidence

NICOR held that FERC, in applying Opinion 77 to the Scarth contracts, unlawfully shifted the burden of proof from Scarth to NICOR, and "created a presumption in favor of Scarth." App. 13a. The court did not determine whether the alleged "presumption" was one of fact (actually an inference) or one of law. Properly viewed, Opinion 77 established certain factual inferences (often mistakenly referenced as presumptions of fact) rather than a legal presumption.[10] Factual inferences do

[10] An inference is not truly a presumption, but instead the existence of the inferred fact may be deduced from the base facts

not shift the burden of proof. Thus, the court erred in invalidating the factual inferences established in Opinion 77. Indeed, it made *no finding* that such inferences were not based on substantial evidence, and therefore FERC's Opinion 77 inferences, which are based on substantial evidence, are conclusive.

FERC in Opinion 77 noted that it previously dealt extensively in its Order 23 series with the issue of whether ARCs authorize NGPA rates, and that the Order 23 record indicated substantial industry agreement that ARCs generally permitted *all* NGPA rates.[11] 10 F.E.R.C. (CCH) at 61,396. Refining Order 23, Opinion 77 established inferences applicable "where other extrinsic factors are unavailable or unreliable," such as where there is no reliable and probative evidence of mutual intent relating specifically to the contract, or such evidence is inconclusive. *Id.* at 61,401, 61,398. FERC established the Opinion 77 inferences based upon the "extrinsic factors" of (1) the "record developed in the [Order 23] rulemaking proceedings;" (2) the "accumulated experience of the Commission in dealing with . . . [ARC's] in a variety of settings," and (3) FERC's recognition that ARCs "were a product of the then prevailing [NGA] regulatory scheme," which included the regulatory and commercial context that the permissible language of ARCs was limited by a FERC regulation at the risk of rejection for non-compliance. *Id.* at 61,396, 18 C.F.R. §§ 154.93(b-1), (c).

Under the Opinion 77 inferences FERC will *generally conclude*:

> that a contract containing an [ARC] did not authorize collection of incentive NGPA rates if: (1)

"by the ordinary rules of reasoning and logic," while in the case of a presumption the existence of the presumed fact must initially be assumed "because of a rule of law." 1 Jack B. Weinstein, *et al.*, Weinstein's Evidence ¶ 300[01], at 300-2 (1995).

[11] The Fifth Circuit acknowledged that Order 23 was promulgated "after extensive feedback and comment from gas producers, pipelines and local distributors." App. 3a-4a, n.2.

> the text of the [ARC] refers to rates established by an administrative body, (2) the reference to administrative action is coupled with a reference to the [NGA] or [its] "just and reasonable" standard . . ., and (3) the contract contains no additional language having the effect of "uncoupling" the link between agency action and the just and reasonable standard.[1] If either of the first two provisions is not present in the text of the [ARC], or if the contract contains uncoupling language, then the [ARC] must be held to authorize all NGPA ceiling rates.

App. 69a. Thus, if the "basic facts" set forth in (1), (2) and (3) of the quote are shown, FERC will infer the ultimate fact of a mutual intent, not to collect incentive NGPA rates, but instead to collect cost-based NGPA rates only. Conversely, the ultimate fact of a mutual intention to collect all NGPA rates will be inferred if the basic facts are shown that either: (1) there is no reference to agency rate establishment; or (2) there is such a reference, but it is not coupled to the NGA or its just and reasonable ("J&R") standard; or (3) there is a coupling of the reference to agency ratemaking to the NGA, or its J&R standard, but there is additional language uncoupling the link.

Justice Scalia has explained the relationship of factual inferences to the substantial evidence test:

> [an inference] is "[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted" . . . . [i]nferences (or presumptions of fact)—are not creatures of the [agency] but its masters, representing the dictates of reason and logic that must be applied in making adjudicatory factual determinations. Whenever an agency's action is reversed in court for lack of "substantial evidence," the reason is that the agency has ignored inferences that reasonably must be drawn, or has drawn inferences that reasonably cannot be.

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 814-15 (1990) (Scalia, J., dissenting). The Fifth Circuit never made the requisite finding that FERC's Opinion 77 factual inferences "reasonably cannot be," but instead unlawfully substituted its own factual inferences for those of FERC.

The "weight to be given to the facts . . . as well as the inferences reasonably to be drawn from them" is for the agency. *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52, 63 (1927). The agency's function is "to draw such reasonable conclusions from its findings as in its discretion are appropriate," and "[i]t is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings." *Illinois Cent. R. v. Norfolk & W. Ry.*, 385 U.S. 57, 69 (1966). The substantial evidence rule "is analogous to appellate review of judgments predicated on jury verdicts." 5 Jacob A. Stein, *et al.*, Administrative Law, § 51.01[2], at 51-51 (1995). The Fifth Circuit elsewhere has acknowledged:

> A jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict. . . . On appeal, we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination. . . . Even though we might have reached a different conclusion if we had been the trier of fact, we are "not free to reweigh the evidence. . . ." We must not substitute for the jury's reasonable factual inferences other inferences that we may regard as more reasonable.

Rideau v. Parkem Indus. Serv., 917 F.2d 892, 897 (5th Cir. 1990) (citations omitted). And if the evidence "is such that it supports inconsistent inferences and conclusions, the courts must defer to [the agency's] choice." *Nueces County Navig. Dist. No. 1 v. ICC*, 674 F.2d 1055, 1063 (5th Cir.), *cert. denied*, 459 U.S. 1035 (1982). The Fifth Circuit ignored these principles with respect to FERC's Opinion 77 inferences, by *failing to determine* that they were not based on substantial evi-

dence, but nevertheless imposing "a different conclusion . . . [than] the trier of fact." *Rideau*, 917 F.2d at 897.[12]

1. The Fifth Circuit contravened the substantial evidence test respecting FERC's factual inferences relative to the ARC in the Amerada contract. FERC found the ultimate fact that the mutual intent under that contract was to allow all NGPA rates, based upon its finding of basic facts that there was a reference in the Amerada ARC to administrative action, but *no reference* to the NGA or its J&R standard. App. 70a. FERC rejected NICOR's request to infer such a reference because "none existed in the text of the clause." App. 94a. Consequently, FERC found that "it was reasonable to conclude" that such contract "does not preclude the collection of any particular ceiling rate," including the congressional NGPA incentive rates. App. 95a.

FERC relied upon Opinion 77, which justified this factual inference:

> Where a reference to administrative action is not coupled with a reference to the [NGA or its] statutory standard . . . [FERC] will generally find that all of the NGPA rates are authorized. . . . A contractual provision with no reference to a particular ratemaking standard would generally indicate an intent to permit prices to rise to the highest prices permitted by law. . . . [FERC's] ratemaking power under the [NGA] was delegated to it by the Con-

[12] Apart from the Opinion 77 inferences, *NICOR* also ignored and failed to give conclusive weight to, FERC's *factual finding* that NICOR's position below was that "the Opinion No. 77 interpretive standards are consistent with Oklahoma state law." App. 84a. *Pennzoil I* held that the burden is upon a party "to inform FERC if the state law that should apply is any different from [FERC's] general [contract] principles." 645 F.2d at 387. Similarly, under Oklahoma law a claim that another state's law applies is a "question of fact" that must be timely pleaded so as to permit submission of contrary evidence, and if not timely pled foreign law "is presumed to be the same as the law of the forum," which was FERC. *C.I.T. Corp. v. Edwards*, 418 P.2d 685, 688-89 (Okla. 1966).

> gress. We will not assume, in the absence of specific language or reliable and probative evidence, that the parties intended to be bound by an agency determination but not by a mandate emanating from the source of that agency's authority. Hence, we decline to conclude that the mere transfer of the ratemaking function from the Commission to the Congress—most likely unforeseen by the parties . . . should operate to defeat [their] intent . . . simply because they expressed that intent in terminology which was based on the regulatory scheme then in force.

10 F.E.R.C. (CCH) at 61,398-99. FERC made the further *factual finding* that its Opinion 77 inference is supported by the evidentiary record because NICOR did not object to congressionally-established rates, but instead its evidence was only offered to prove that it allegedly intended to pay only cost-based rates, and it was only in its rehearing brief, after losing, that NICOR "approached the issue of what type of ratemaking forum was contemplated (Congress or an . . . agency)." App. 99a. This factual finding is "conclusive" and the Fifth Circuit violated the substantial evidence test by ignoring it.

The Fifth Circuit provided *absolutely no discussion of the Opinion 77 inferences as applied to the Amerada contract,* and thus made no finding that such inferences were not based on substantial evidence. It also acknowledged FERC's *factual finding* that such contract "failed to refer to the NGA or to the 'just and reasonable' standard." App. 6a. FERC's factual findings, including the ultimate finding of mutual intent to authorize all NGPA rates under such contract, is "conclusive."

2. The Fifth Circuit also contravened the substantial evidence test respecting the Sun and GHK contracts, because it also made no finding that FERC's Opinion 77 inferences respecting the ARCs in such contracts were not based on substantial evidence. The Sun and GHK

ARCs did refer to the basic facts of agency-established rates and the J&R standard (but not the NGA). FERC nevertheless made the *factual finding* that the linking of agency action to the J&R standard was uncoupled because such contracts' "inclusion of rates set by 'any successor governmental authority' permits the collection of rates set by Congress," and not just by agency action. App. 72a. FERC noted the foundation of this factual inference:

> . . . the Commission held in Opinion No. 77 that, "if a reference to administrative action is followed by language broad enough to encompass legislative enactments, the clause would appear to indicate that the parties did not intend to be restricted to the outcome of an agency proceeding." . . . In this case there is nothing . . . that can clearly be read as excluding rates set by Congress or in any way limiting the scope of authority exclusively to rates set by an [agency].

App. 73a-74a.[13]

FERC's factual conclusion respecting the ARCs in these contracts is further supported by the contracts' "Regulation" clause, which anticipated possible future statutory changes by providing that they are "subject to all present and future valid laws and lawful orders and regulations of all regulatory bodies now or hereafter having jurisdiction." App. 124a-126a. This Court has held that such provisions "stem from the assumption that the contracts are subject to governmental price and other regulation . . . . Their purpose is to 'provide that the contract shall continue in effect though modified to conform to the requirements of such law or regulation.'" *Energy Reserves Group, Inc. v. Kansas Power & Light*

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[13] In Opinion 77 FERC also found that a reference to a "successor statutory authority" or similar words reflect that "the parties commit their contractual destiny to a change in the statutory scheme and give advance acceptance to the outcome of the legislative process." 10 F.E.R.C. (CCH) at 61,399.

Co., 459 U.S. 400, 416 n.22 (1983) (*quoting* 4 H. Williams, *Oil & Gas Law* § 734, at 800-802 (1981)). Moreover, FERC here found that the evidence supported its inference because it made the *factual finding* that NICOR did not present evidence objecting to congressionally-prescribed rates, but instead its evidence addressed *only* its claim that cost-based rates were intended. App. 74a, n.33; 99a.[14]

In sum, by failing to make findings that FERC's inferences of fact were not supported by substantial evidence, and instead substituting its own factual findings, the Fifth Circuit violated this Court's decisions relative to factual inferences and substantial evidence.[15]

B. The Court Also Relied Upon Invalid Factual Findings Contrary To The Substantial Evidence Test

The Fifth Circuit summarizes its holding in its final paragraph, declaring that "[b]ased on the findings in the

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[14] FERC also found that the reference in the GHK and Sun contracts to the J&R standard of the NGA did not restrict the "successor governmental authority" language to only administrative actions. App. 96a. FERC interpreted the plain language of the NGPA finding that Congress expressly deemed *all* NGPA prices to be "just and reasonable" for purposes of the NGA. App. 74a. *See* 15 U.S.C. § 3431(b)(1)(A) (this section was replaced in 1989 with a new 15 U.S.C. § 3431(b)(1)(A)). *Pennzoil I* held that "just and reasonable" is "merely a term of art for the public interest," and further noted that "[c]ongressionally established rates are of course prescribed in the public interest, and therefore are within the meaning of 'just and reasonable.'" 645 F.2d at 379 n.37, 383 n.45.

[15] The Fifth Circuit also ignored other FERC factual findings that: (a) "the producers intended to get the highest lawful rate;" (App. 91a, n.23; 58a); (b) NICOR's witnesses conceded "there is no evidence that . . . a 'cost-based' limitation" was ever expressed in negotiations (App. 60a, 79a); (c) NICOR did not object to rates set *by Congress* (App. 99a); and (d) when the contracts were negotiated (1969-1970) there was "no specific FPC-established ceiling rates" for gas under the contracts and in such contracts NICOR *agreed to pay* "a non-cost-based" rate. App. 61a, n.14; 91a-92a, n.25.

ALJ's order and the Commission's original order affirming the ALJ, Scarth failed to prove by a preponderance of the evidence that the contracting parties intended to authorize [NGPA] § 108 prices." App. 14a. Thus, for its ultimate conclusion, the court relied upon the findings of the ALJ in his Initial Decision and FERC in its first order. But FERC modified these findings in its second and third orders. It is these latter orders which are the operative FERC orders under review. A court reviews the interpretation of the agency, and not the ALJ, even if it prefers the ALJ's approach. *Bullion v. FDIC*, 881 F.2d 1368, 1374 (5th Cir. 1989).[16]

This Court's cases "forbid[] a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986). The Fifth Circuit improperly picked and then chose to endorse the ALJ and first FERC order findings which FERC itself modified, rather than the effective second and third FERC order findings. The Fifth Circuit thereby (a) "disregarded well-established standards for reviewing the factual findings of agencies;" (b) endorsed "particular findings which the court thought appropriate, but which were contrary to those actually made" in the operative orders; and (c) violated the principle that "[t]he court should not supplant the agency's findings merely by identifying alternative findings that *could be* supported by substantial evidence." *Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992) (emphasis added).[17]

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[16] At best, the ALJ's findings can be considered to determine whether FERC's findings are supported by substantial evidence. But the Fifth Circuit did not do this. Nowhere did it conclude that FERC's findings in its second and third orders were not based on substantial evidence. *See NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982) (when the agency and ALJ make contrary findings, "the [substantial evidence] deference accorded fact findings runs in favor of the [agency]," not the ALJ).

[17] *See also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Cia Mexicana De Gas, S.A. v. FPC*, 167 F.2d 804, 806

IV. *NICOR* WAS DECIDED IN CONFLICT WITH THIS COURT'S DECISIONS CONCERNING AN AGENCY'S USE OF PRESUMPTIONS AND THEIR SCOPE OF REVIEW

Even assuming, *arguendo*, that FERC utilized a "legal presumption" rather than a factual inference in applying Opinion·77, *certiorari* should be granted because *NICOR* (1) directly conflicts with Supreme Court cases permitting the use of regulatory presumptions; and (2) failed to apply the Supreme Court's decisions concerning the appropriate standard for reviewing legal presumptions.

The "development of . . . presumptions is normally the function" of the agency, *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 789 (1979), and "its conclusions on such matters are traditionally accorded considerable deference." [18] *Id.* at 796 (Brennan, J., concurring). The validity of such presumptions depend upon the rationality of what is proved and what is presumed. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 493 (1978). A challenging party "bears the heavy burden of demonstrating that there is no rational connection between the fact proved and the ultimate fact to be presumed." *Cole v. United States Dep't of Agric.*, 33 F.3d 1263, 1267 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1956 (1995).

1. *NICOR* patently erred in stating the nature of the presumption FERC employed. The court erroneously claims Opinion 77 "essentially created a presumption in favor of Scarth" by allegedly presuming that ARCs gen-

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(5th Cir. 1948) ("[a] commission, like a court, may, indeed should, change its findings and order if on rehearing it is of a different mind. *If it does so change, our function on a review of its findings and order is to determine not which of the two findings and orders was the best but whether . . . the findings and order under review are without evidence to support them*") (emphasis added).

[18] *NICOR* also contravened Court pronouncements that a *judicial* "presumption of validity . . . attaches to each exercise of the Commission's expertise," *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (citation omitted).

erally permit NGPA § 108 rates unless the ARC satisfies all three prongs of Opinion 77. App. 13a, *citing* App. 86a. In Opinion 77, FERC stated its general conclusion was just the opposite. Instead of favoring § 108 rates, FERC stated in Opinion 77 that "the Commission will generally conclude that a contract containing an [ARC] *did not* authorize collection of incentive NGPA [§ 108] rates." App. 69a (emphasis added). What was "presumed" in Opinion 77 was that only cost-based NGPA rates were permitted if the ARC linked agency-established rates to the NGA (or its J&R standard), and there was no uncoupling of this link. FERC found that Scarth rebutted this presumption by showing that (1) there was no linking of agency rates to the NGA respecting the Amerada ARC, and (2) the Sun and GHK ARCs had "successor governmental authority" language uncoupling the link. Therefore, FERC found that Scarth showed that the parties intended whatever rate was authorized by the government. App. 69a-75a.

2. Assuming, *arguendo,* that Opinion 77 created a "legal presumption" in favor of incentive NGPA rates, that presumption is valid under Supreme Court precedent. FERC's Opinion 77 rules were based on its own expert knowledge of the commercial and regulatory context when contracts with ARCs were executed and any "legal presumption" was based on its view of "fairness, public policy . . . probability . . . and [administrative] economy." *Basic Inc. v. Levinson,* 485 U.S. 224, 245 (1988). *See* Opinion 77, 10 F.E.R.C. (CCH) at 61,400-02, for FERC consideration of similar factors in Opinion 77. The Fifth Circuit, in attacking the "presumption" (App. 13a-14a), made no contention, and therefore no finding, that there was not a rational connection between what FERC proved and what FERC presumed. Particularly in view of the Fifth Circuit's failure to apply the "rational connection" standard of review, substantial deference should be accorded any legal presumptions made by FERC.

3. Again assuming, *arguendo*, that Opinion 77 created a "legal presumption" in favor of incentive NGPA rates, *NICOR* erred in holding that FERC's presumption unlawfully shifted the burden of proof by requiring NICOR to prove the absence of contractual authority. App. 12a. Such *NICOR* holding unlawfully failed to give the Opinion 77 presumption the effect required by Federal Rule of Evidence 302, which provides that "the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision." App. 123a. Here, the Fifth Circuit held (App. 9a-10a) that Oklahoma contract law applies. Oklahoma law on the effect of presumptions therefore controls. Under Oklahoma law the effect of a presumption is to shift the *burden of proof* to NICOR.[19] FERC effectively found that NICOR failed to meet this state law burden. App. 86a ("NICOR did not prove by a preponderance of the evidence that the parties had a mutual intent to limit . . . [ARCs] to only cost-based rates").[20] While Scarth had the ultimate federal law burden of proving that its rate is just and reasonable, that burden was met because Scarth had contractual authority, as determined under applicable state law, to collect the NGPA, § 108 rate.

4. *NICOR* erred even if the federal, rather than state law, effect of presumptions is applied. Rule 301 of the Federal Rules of Evidence operates "as a procedural device to shift the burden of producing evidence, exposing the opponent of the presumption to the risk of an adverse result on a directed verdict if he fails to present

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[19] *See* Okla. Stat. Ann. tit. 12, §§ 2301-2303; 1 Weinstein's Evidence ¶ 301[05], at 301-97 to -98; *Brown v. Oklahoma Transp. Co.*, 588 P.2d 595, 600 (Okla. Ct. App. 1978); *Nanonka v. Nanonka*, 645 P.2d 507, 508 (Okla. 1982). The burden of proof is a matter of substantive law under *Erie*. 10 Moore's Federal Practice § 302.02, at III-36 (2d ed. 1995).

[20] FERC's findings in Opinion 77 that the base facts of its construction rules are probative of the presumed fact of mutual intent also satisfy the requirements of Oklahoma law for valid legal presumptions. App. 69a-75a; 10 F.E.R.C. (CCH) at 61,398-99.

enough evidence to support a finding of the nonexistence of the presumed fact." 1 Stephen A. Saltzburg, *et al.*, Federal Rules of Evidence Manual 140 (6th Ed. 1994). Here, FERC made the factual finding that "the evidence was inconclusive on whether NICOR made a case for its alleged intent to have a cost-based limitation" on the ARCs. App. 79a. Thus, NICOR failed in its federal law burden of producing evidence to rebut any Opinion 77 "legal presumption" because it failed "to present enough evidence to support the nonexistence of the presumed fact." [21]

V. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS BECAUSE *NICOR* FAILS TO APPLY OKLAHOMA LAW AND IS CLEARLY CONTRARY TO DECISIONS OF OKLAHOMA'S COURTS

While *NICOR* states that the law of Oklahoma is to apply (App. 10a), it fails to apply Oklahoma law. Thus, *NICOR* did not simply misapply "a properly stated rule of law," Sup. Ct. R. 10, and this Court should exercise its supervisory powers. This Court has set aside appellate rulings as to state law where, as here, the lower court's ruling on state law constitutes " 'plain error' . . . the lower court is 'clearly wrong' . . . or the construction is 'clearly erroneous' . . . or 'unreasonable' ". *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985). *Certiorari* is particularly appropriate because the Fifth Circuit was not ruling on the law of a state within its circuit, where it might have expertise, which is a primary basis for this Court's deference in other cases to appellate court's interpretations of state law. *Id.* at 500.

1. *NICOR* committed plain error in claiming that Scarth did not meet his Oklahoma law burden of proof because he failed "to prove by a preponderance of the

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[21] Even if NICOR had presented sufficient evidence so that the mandatory presumption drops from the case, Scarth's "evidence [as plaintiff] and inferences properly drawn therefrom may be considered by the trier of fact" and may be sufficient "to discredit" NICOR's evidence (as defendant). *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

extrinsic evidence that the parties mutually intended to allow non-cost-based rates." App. 13a. Scarth's state law burden was to present a "greater weight of the evidence," *not just extrinsic evidence*, that his meaning of the contract provision "is more probably true than not true." Oklahoma Uniform Jury Instructions, Civil 21 (Okla. Sup. Ct.. Comm. for Uniform Jury Instr. 2d ed.) [hereinafter OUJI] (emphasis added), App. 132a.[22] The jury, or here, FERC, as the factfinder, is "to take into account *all the evidence.*" *Id.* (emphasis added); *see also Morrow v. Morrow*, 612 P.2d 730, 732 (Okla. Ct. App. 1980). *Even with ambiguous contracts* the jury must "first examine the language of the contract" because such language "is the primary determinant of its meaning." OUJI, App. 135a, 136a. *NICOR* therefore erred in claiming Scarth's burden was to prove its case by a preponderance of *extrinsic evidence* alone. While FERC extensively considered extrinsic evidence (App. 58a-69a), FERC also properly considered *all* of the evidence, including the language of the contracts and the regulatory circumstance of use of ARCs, and found that the greater weight of *all* evidence proved that Scarth met his burden.[23]

2. *NICOR* also committed plain error in claiming that Opinion 77 "conflicts with Oklahoma contract law"

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[22] In accordance with state legislative direction, Okla. Stat. Ann. tit. 12, §§ 577.1, 577.2, the Oklahoma Supreme Court by order has directed that trial judges generally must utilize the OUJI instructions. SCAD 93-3, Feb. 26, 1993, App. 129a-30a. The Fifth Circuit therefore was bound to (but failed to) consider such instructions in reviewing FERC's fact-findings as the equivalent of a jury. The Oklahoma Supreme Court's order and the pertinent instructions are attached in the Appendix hereto. App. 127a-37a.

[23] The court also erred in claiming that Scarth had to prove a mutual intent "to allow non-cost-based rates." App. 13a. Scarth under Oklahoma law only had to prove that the ARCs provide contractual intent to authorize price escalations to the NGPA § 108 rate. FERC's role was to "first examine the language of the contract" (OUJI, App. 135a), which provides *no* limitation to only cost-based rates, and to assess that evidence together with the extrinsic evidence. OUJI, App. 136a. Such analysis under Oklahoma law showed, as FERC found, that NICOR's claimed cost-based limitation simply does not exist.

because FERC failed "to give any weight to the extrinsic evidence of the parties' intent." App. 10a-11a. Although Oklahoma law requires FERC to *consider* extrinsic evidence of intent, it *does not* mandate that FERC *must give weight* to such evidence. "[T]he weight of the evidence is a question for the jury," or here, FERC as the factfinder. *Rain v. Balph,* 293 P.2d 359, 362 (Okla. 1956). FERC did *consider* extensively the parties' extrinsic evidence. App. 58a-69a; 85a-92a. FERC nevertheless found that such evidence was "inconclusive," and equated "inconclusive" with not "reliable and probative." App. 69a. FERC *could not* give weight to evidence that it found was not reliable and probative, and Oklahoma law does not require otherwise. It was plain error for *NICOR* to require FERC to give weight to evidence FERC had found was not reliable and probative.

Under Oklahoma law, where the extrinsic evidence is in conflict "it becomes necessary to examine the instruments themselves," as FERC did, to determine where "the weight of the evidence . . . rests." *Iron Mountain Oil Co. v. Edwards,* 100 Okla. 4, 9, 227 P. 150 (1924); *see also Beck v. Traders & General Ins. Co.,* 77 P.2d 109, 113 (Okla. 1938) (with conflicting evidence "there is no practical construction to overcome the language of the contract"). "[T]he weight of the evidence is a question" for the factfinder. *Rain,* 293 P.2d at 362, which findings are conclusive both under Oklahoma law, *Dismuke v. Cseh,* 830 P.2d 188, 190 (Okla. 1992), and under the NGA and NGPA. 15 U.S.C. §§ 717r(b), 3416(a)(4).

3. *NICOR* committed plain error by ignoring applicable Oklahoma caselaw and Oklahoma statutory rules of construction. Okla. Stat. Ann. tit. 15, §§ 151-177 (West 1993). In fact, in one of the few Oklahoma cases *NICOR* does cite, the Oklahoma court held that in ascertaining contractual intent "if otherwise doubtful," construction rules are to be applied. *Bonner v. Oklahoma Rock Corp.,* 863 P.2d 1176, 1181 n.16 (Okla. 1993). This is what FERC did. FERC found that the extrinsic

evidence was "otherwise doubtful," and, as required by Oklahoma law, turned to the contract language and rules of construction to make its final ruling.

FERC's conclusion of contract entitlement is consistent with Oklahoma's contract construction rules, which provide that, if a promise is ambiguous, "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it," and a contract "should be interpreted most strongly against the party who caused the uncertainty to exist," and "[t]he promisor is presumed to be such party." Okla. Stat. Ann. tit. 15, §§ 165 and 170. NICOR is the promisor under the ARCs to pay escalated ceiling rates, and so is presumed to cause the uncertainty. Moreover, it drafted the GHK and Sun ARCs, Exh. 102 at 3, T. 455, 935, and "the language of the contract should be interpreted most strongly against the party who drafted the contract." *Dismuke*, 830 P.2d at 190.[24] NICOR also "caused the ambiguity" since in 1970 it wrote GHK stating that it would pay a "higher area field price" if approved, and "this makes it possible for you to obtain the maximum possible legal price." Exh. 6. The NGPA prices are such "maximum legal prices." Thus, FERC's contractual conclusions were consistent with Oklahoma case law and rules of construction.[25]

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[24] *Dismuke* held that even with questions of law, the trial court must be affirmed "if there is any evidence . . . tending to support findings at law." *Id.* at 190. In a "contract action" the reviewing court must affirm the trial court "if supported by any probative evidence." *Morrow*, 612 P.2d at 732. Moreover, "the weight of the evidence is a question for the jury," and the factfinders' determinations are conclusive unless without *any* evidentiary basis. *Rain*, 293 P.2d at 362; *Dismuke*, 830 P.2d at 190; *NICOR* therefore failed to apply the proper *Oklahoma* standard of review.

[25] Oklahoma law also provides that a contract shall be interpreted to make it reasonable. Okla. Stat. Ann. tit. 15, § 159. FERC's result is reasonable, while *NICOR*'s is not, because the ARCs were conceded to permit congressionally-established NGPA prices, and the alleged "cost-based" limitation does not appear in the plain language of any of the contracts or in *any* of the contemporaneous documents (T. 328). Prior to the NGPA, Commis-

4. *NICOR* also committed plain error by misapplying the Oklahoma contract construction principles that it did employ. *NICOR* claimed (App. 12a) that FERC erred under Oklahoma law by focusing on one phrase of the ARCs without considering the clauses and contracts as a whole. However, FERC *did* consider the whole ARCs, by focusing on whether there is a reference to agency-established rates tied to a reference to the NGA or its J&R standard, *and* whether there is additional language uncoupling that link. App. 69a-75a. FERC found that the reference in the ARCs to rates set by a "successor governmental authority" broke any link in the ARCs between (a) the NGPA (or its J&R standard); and (b) agency-established rates. App. 74a-75a. FERC's construction of the ARCs also is consistent with the contracts' "Regulation" clauses which subject them "to all present and future valid laws." App. 124a-26a. Reading together the Regulation clause with the "successor governmental authority" language in the ARC clearly supports an intent to collect rates established by Congress in the NGPA, a "future valid law," and also complies with the Oklahoma rule that "[t]he whole of a contract is to be taken together . . . each clause helping to interpret the others." Okla. Stat. Ann. tit. 15, § 157. Thus, *NICOR* was wrong in claiming FERC did not consider both the ARCs and the contracts as a whole, as required by Oklahoma law.

VI. *NICOR* CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING THE SCOPE OF AGENCY AUTHORITY UPON REMAND

NICOR held it would "vacate the Commission's order and remand the case to the Commission for entry of an order denying Scarth's request for a rate increase." App.

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sion-established rates that reflected pricing *incentives* as well as cost, were paid under the three Scarth contracts. *See* p. 2, *supra*. Thus, *NICOR*'s imputation of a "cost-based" restriction is unreasonable, and effectively revises the contract by imputing a limitation to "cost-based" rates, though *"a court may neither make a new contract to benefit a party nor rewrite the existing one." Bonner*, 863 P.2d at 1183.

2a. Assuming, *arguendo*, that the *NICOR* decision was not unlawful, *see*, *supra*, the remand directive as to how FERC must exercise its NGA and NGPA statutory powers concerning a rate increase unlawfully usurps administrative discretion and contravenes this Court's precedents. In reviewing FERC orders, "the function of the reviewing court ends when an error of law is laid bare . . . . the matter [then] goes to the Commission for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). While a court " 'may thus correct errors of law and on remand the Commission is bound to act upon the correction,' " such action " 'does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.' " *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 406 (1965), *quoting*, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). Having laid bare FERC's "error of law," the Fifth Circuit's duty ended, and it should have remanded the case for FERC to enforce the legislative policy of the NGPA and the NGA. *NICOR*'s mandate that FERC deny Scarth's § 108 rate request unlawfully forecloses any "reconsideration" by FERC of the matter.

CONCLUSION

Wherefore Scarth prays that a writ of *certiorari* issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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